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AMERICAN PUBLIC EDUCATION AND CHANGE: NOT AN OXYMORON

VICTORIA J. DODD*

I. INTRODUCTION

The average American is exposed on a daily basis to a barrage of print and media criticism of public education in this country. American public schools are portrayed as being dilapidated,¹ archaic,² ineffective, and incapable of reformation. Studies are cited to demonstrate that American school children lack important skills and knowledge bases that are crucial for international economic competition.³ Some of these negative evaluations are indeed valid.

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1. See generally GEN. ACCT. OFF., HEALTH, EDUC., AND HUM. SERV. DIV., SCHOOL FACILITIES - AMERICA'S SCHOOLS NOT DESIGNED OR EQUIPPED FOR 21ST CENTURY 95 (1995); Peter Applebone, *Enrollments Soar, Leaving Dilapidated Schools Bursting at Frayed Seams*, *New York Times*, NATIONAL REPORT, August 25, 1996, at 24.

2. See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES* (1991)(describes tragic state of American public education in several urban areas and comparing it with that offered in affluent, suburban areas).

3. See, e.g., Bill Clinton, *Priority Issues for the States as Educational Reform Continues*, 1 STAN. L. & POL'Y REV. 5, 6 (1989)(stating American students' scores on math and science are below students in other industrialized countries); Chester E. Finn, *Appraising the Clinton Education Plan*, Hearing Before The Committee on Education and the Workforce of the U.S. House of Representatives, 105th Cong. (1997)(stating 1996 National Assessment Educational Progress statistics place American students closer to Kuwait and South Africa in math and science than to Singapore and Japan); John H. Bishop, *Education and Economic Competitiveness: Improving Education: How Large are the Benefits? How Can it Be Done Effectively*, Hearing Before the Subcomm. on Education, Arts and Humanities of the Senate Comm. on Labor and Human Resources, 104th Cong. (1995)(secondary school completers in Europe and Asia are better prepared in math, science and foreign language than American counterparts. Similarly, Finnish scores are higher in biology and chemistry); Kent Lloyd, *Education and Economic Competitiveness: Improving National Economic Competitiveness Through Educational Investment*, Hearing Before the Subcomm. on Education, Arts and Humanities of the United States Senate, 104th Cong. (1995)(stating that American students fall short of international students in mathematics, science, geography, history, civic, literature, writing skills, and art. Mr. Lloyd attributes this to shorter school days).

Some American public schools surely fall below the mark when compared with the educational institutions of many other industrialized nations.⁴

What the American public is less aware of, however, is an on-going march of changes within American public education which are internally-generated, state-originated, systemic responses to a changing social and economic order. This article will discuss and evaluate various state reform models of public education, with the goal of demonstrating that American education can change and is changing to meet the challenges of a new century. It will be argued as well that American public education, while evolving, can remain essentially intact and true to its core values of inclusion and pluralism. There is therefore no need to totally dismantle the traditional American public education scheme and substitute for it funding mechanisms, such as voucher systems,⁵ which would convert our system to a more separatist (i.e., separate or non-public) model. Since the overwhelming majority of American school children attends public schools,⁶ it seems unwise to overly concentrate the nation's intellectual and financial resources toward the private, rather than the public, school model.

In the first section of this article, the history of American public education will be discussed, emphasizing how our public educational system has constantly evolved to meet the social and economic realities of the day. Three important, co-existing current models of public school reform will then be explored in some detail: home schooling movement, charter schools, and public school choice. The salient features of each trend will be discussed and some suggestions as to possible improvements will be made. It will be emphasized that American education, like the American country, has always been in the process of re-inventing itself. American public education, while not a gazelle, is not the frozen woolly mammoth featured in American magazine cover stories.

4. See, e.g., Victoria Dodd, *Why Schools Belong in Offices*, Forum Page, *New York Times*, September 30, 1990, at 11. (American school year far shorter than those of other major industrialized nations). Accord, Kent Lloyd, *Education and Economic Competitiveness: Improving National Economic Competitiveness Through Educational Investment*, Hearing Before the Subcomm. on Education, Arts and Humanities of the United States Senate, 104th Cong. (1995)(stating that American students fall short of international students in mathematics, science, geography, history, civics, literature, writing skills, and arts. Mr. Lloyd attributes this to shorter school days).

5. Pure voucher systems are ones where state moneys or tax credits would be used to subsidize or support both public and private education, including religiously-based schools. See generally *The School - Choice Controversy* (James W. Skillen ed., 1993)(spirited, conservative defense of choice and voucher movement). Cf. JOHN COONS & STEVEN SUGARMAN, *EDUCATION BY CHOICE* (1978).

6. In 1988, approximately ninety-one percent of American school children in the eighth grade attended public, rather than private, schools. PARENTS, THEIR CHILDREN, AND SCHOOLS 148 (Barbara Schneider and James S. Coleman eds., 1993).

II. HIGHLIGHTS OF THE HISTORY OF AMERICAN PUBLIC EDUCATION

The early American colonies emphasized the importance of public education, as reflected in the many colonial statutes treating the subject. In 1647, for instance, the colony of Massachusetts passed an act requiring each town of fifty households to provide a local common school to teach children to read and write.⁷ Another section of the statute also declared that in larger towns of one hundred households a grammar school would be established, to teach children Latin and other subjects to prepare them for college.⁸ Nearly identical statutes can be found in the laws of the colony of Connecticut as well.⁹ Indeed these seventeenth century public education concerns have been considered by some to have been a primary reason for the very existence of legally established, local communities in the colonies:

The establishment of schools for the education, to some extent at least, of all children of the whole people, is not the result of any recent enactment . . . [it] extends back two hundred years, to the early settlement of the colony. Indeed, the establishment of popular schools is understood to have been one of the objects for which powers were conferred on certain associations of persons living together in townships, enabling them to regulate and manage certain prudential concerns in which they had a common interest.¹⁰

Interestingly enough, these early colonial public school laws appear to have been inspired, or perhaps even required, by the colonists' primordial central government, as revealed in the 1643 Articles of the Confederation of the United Colonies of New England.¹¹

In the eighteenth century, many of the American colonies drafted state constitutions which generally contained language elevating or protecting the rights of a state's children to a public education.¹² Public educational systems

7. *Jenkins v. Andover*, 103 Mass. 94, 97 (1869)(court ruled that "public schools" in Massachusetts state constitution referred to schools lower than grammar schools, grammar schools, common schools, and schools up to and including high school).

8. *Id.*

9. CONN. GEN. LAWS, CHILDREN, SCHOOLS (Hartford, 1672), *reprinted in* THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES 87, 136-137 (1977).

10. *Cushing v. Newburyport*, 10 Met. 508, 511 (10 Mass. 1845)(state statutes requiring localities to tax themselves to fund certain schools set forth only minimum standards).

11. ARTICLES OF CONFEDERATION BETWIXT THE PLANTATIONS UNDER THE GOVERNMENT OF MASSACHUSETTS [SIC], THE PLANTATIONS UNDER THE GOVERNMENT OF PLYMOUTH, THE PLANTATIONS UNDER THE GOVERNMENT OF CONNECTICUT, AND THE GOVERNMENT OF NEW HAVEN, WITH THE PLANTATIONS IN COMBINATION THEREWITH, 32 CHILDRENS [SIC] EDUCATION, *reprinted in* THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES 25-26 (1977). Although the United States Supreme Court held in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973), that the United States Constitution did not establish a fundamental right to an education, the early colonialists seemed to have felt otherwise.

12. *E.g.*, MASS. CONST. PART II, c. 5, § 2 (1780); Victoria Dodd, *An (Adequate) Education for All*, 24 THE ADVOCATE, 22 - 23 (1993). Parenthetically, as the 1780 Constitution of Massa-

were evolving; public education, once deemed important partly for religious reasons,¹³ was now established to preserve a free government and to inculcate "all social affections, and generous sentiments, among the people."¹⁴

Perhaps the next significant evolution of American education was the initiation in the mid-nineteenth century of state-imposed, compulsory education requirements for all children. The first compulsory education laws originated in the state of Massachusetts after the establishment in 1837 of a state board of education. After that time, the concept of compulsory education spread rapidly throughout the United States and became the dominant model of education. Under this model, instead of being a religiously or normatively based institution, public education was now considered to be an instrument of social, intellectual, and moral progress:

Education is to inspire the love of truth, as the supremest good, and to clarify the vision of the intellect to discern it. We want a generation of men above deciding great and eternal principles Our advanced state of civilization has evolved many complicated questions respecting social duties. We want a generation of men capable of taking up these complex questions, and of turning all sides of them towards the sun, and of examining them by the white light of reason, and not under the false colors which sophistry may throw upon them.¹⁵

Accordingly, constitutions written after the rise of compulsory education frequently referred to the utilitarian aspect of education: The constitution of the state of New Hampshire, among many examples, states that "[t]he legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools"¹⁶

chusetts was drafted by at least two of the Framers of the United States Constitution, John Hancock and John Adams, one again might question the finding of the United States Supreme Court in *Rodriguez* of a lack of federal constitutional protection in the area of education. Cf. *McDuffy v. Sec. of the Exec. Office of Educ.*, 415 Mass. 545, 576 - 579, 615 N.E.2d 516, 532-534 (1993) (court holds that education article in state constitution requires that state guarantee all children an adequate education).

13. The Articles of Confederation of the United Colonies of New England stated that the purposes of education were to enable children to duly read the Scriptures and other books and to be able to answer the questions of colonial officials. See *supra* note 11 and accompanying text.

14. N.H. CONST. PART II, art. 93 (1784). See generally *Claremont School Dist. v. Governor*, 703A. 2d 1353 (N.H. 1997)(court holds that education article in state constitution sets forth a fundamental right to an education).

15. Horace Mann, *Lectures and Annual Reports on Education* 80 (1867).

16. N.H. CONST. ART. IV, § 6-7 (amended 1875); *Robinson v. Cahill*, 62 N.J. 473, 508-509, 303 A.2d 273, 291 (1973) (court holds that state constitution guarantees a fundamental right to an education). See also *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 189 (Ky 1989) (state constitution required legislature to "provide an efficient system of common schools . . ."); *Washakie Co. School Dist. v. Herscher*, 606 P.2d 310, 311 (Wyo. 1980)("[L]egislature shall . . . create and maintain a thorough and efficient system of free schools").

The victory of compulsory education¹⁷ led to many further evolutions in American public schools. Once all children were required to be schooled and did generally attend school, educational reformers in the early twentieth century could focus on the relationship between the social organization of the classroom and society in general. John Dewey and other progressives, for example, argued that the school environment should embody the fluidity and complexity of human society.¹⁸ The contributions of Dewey and his colleagues are still visible in the open, interactive styles of many American classroom structures and curricula.

American public education has indeed changed over time to match the concerns of each era. The early colonists established state-funded public schools; later generations drafted constitutions guaranteeing a state right to a public education; and subsequent reformers established and refined a universal system of compulsory public education. As discussed below, three current innovations in American public education are surfacing to respond to the educational angst of our age. These three educational models are the home schooling movement, charter schools, and public school choice.

III. THE HOME SCHOOLING MOVEMENT

Compulsory education exists in all states to require children to attend school until a designated age, usually sixteen years.¹⁹ By state law, American school children are required to attend either a public or private institution of education²⁰ or to be statutorily exempted from these requirements. The majority of states, however, permits parents to educate their children at home if various state regulations are followed. As of 1986, at least thirty-four states²¹ had designated home schooling, under some circumstances, as an alternative mode of education to the traditional forms of education in public or private schools.

In some of these states, home education is considered to be a species of private education;²² other states allow parents to choose to educate their child under either the state laws pertaining to private education or pursuant to spe-

17. See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (Supreme Court views compulsory education as a demonstration of the societal importance placed on education).

18. See generally John Dewey, *DEMOCRACY AND EDUCATION* (1916); *SCHOOL AND SOCIETY* (1899).

19. See, e.g., FLA. STAT. ANN. § 232.01 (West 1989).

20. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (states may constitutionally regulate education and require children to attend either public or private schools).

21. Edward Proctor, *Delconte v. State: Some Thoughts on Home Education*, 64 N.C. L. Rev. 1302, 1311 (1986).

22. See, e.g., FLA. STAT. ANN. § 232.02 (West 1997); See *State v. Buckner*, 472 So. 2d 1228 (Fla. Ct. App. 1995); *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 433-434 (Tex. 1995) (underlying statute, TEX. EDUC. CODE ANN. § 21.033, *repealed* May 30, 1995).

cific home schooling regulations.²³ A few states view, or have viewed, home education as a form of tutoring,²⁴ ironically a vision more true to the eighteenth and nineteenth century roots of the home education tradition. Whatever its statutory origin, home education exists legally only because of the permission of the state, and thus can be considered as a part, albeit a small one,²⁵ of the state's comprehensive educational scheme.

As part of the educational apparatus of the state, the home education model serves various functions. For parents who desire their child to be exposed to a curriculum somewhat different than that offered in the public schools, home schooling offers an opportunity for curricular flexibility within the basic subject requirements set by the state. In addition, those parents who criticize the public schools because of a lack of trust in teachers can test their observations while they themselves serve as instructional personnel. In addition, many conservatives and others rebuke public schools for eschewing religious references or "values" education. Home education can also be an avenue to meet some of the concerns of these groups,²⁶ without generally running afoul of Establishment Clause issues.²⁷ In short, the home education movement is functioning as one outlet, among several, for a discrete faction of parents who have certain dissatisfactions, objectively justified or not, with the public schools. At the same time, however, the state sufficiently supervises the education of these children so that the state's concern for safe²⁸ and adequate education²⁹ is met. Home schooling is therefore one significant example of a state-organized, evolving educational structure that provides some parental flexibility within the confines of the general public school system, while still allowing the state to meet its historical and legal responsibilities.

The legal standard for the overall regulation of home education, as for other forms of non-public school instruction, is that the state regulation be "rea-

23. See, e.g., *Birst v. Sanstead*, 493 N.W.2d 690 (N.D. 1992).

24. See CAL. EDUC. CODE § 48224 (West 1993).

25. Although a small percentage of American school children attend school at home, their gross numbers are startling. It is estimated that from 260,000 to one million children annually are involved in home schooling. John S. Lerner, *Protecting Home Schooling Through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363 n. 1 (1995).

26. See *Delconte v. State*, 329 S.E.2d 636, 639-640, 313 N.C. 384, 387-389 (N.C. 1985) (father objected to public school education for religious and "socio-psychological" reasons).

27. See *Swanson v. Guthrie Indep. School Dist.*, 1998 U.S. App. Lexis 1259 (10th Cir. 1998) (parents claimed Free Exercise exemption from school rule forbidding any student, including home schoolers, from taking a part-time load in local schools).

28. See *J.B. v. Washington County*, 127 F.3d 919 (10th Cir. 1997) (county officials seized home schooled child to investigate eyewitness reports of sexual abuse by father).

29. *Jeffery v. O'Donnell*, 702 F. Supp. 513, 515 (M.D. Penn. 1987) ("The governmental interest at issue in this case is the assurance that the children receive an education").

sonable."³⁰ Many states define the curricular requirements of home schooling as constituting an education that is "equivalent"³¹ or "substantially equivalent"³² to that offered in the public schools. Although some courts have ruled such standards to be unconstitutionally vague,³³ in practice the curricular regulation of home schooling is quite moderate,³⁴ and frequently allows parents to develop individualized or quasi-individualized programs of study for their child. For example, the state of Pennsylvania has enacted what is considered a fairly strict scheme of statewide rules for home education, yet its requirement that parents keep a portfolio and log of a child's work³⁵ is mild compared to what is usually required of classroom teachers in most public schools. Since home education is offered under the rubric of state compulsory education law, it does seem fair and appropriate that the basic home education course work vaguely approximate that offered in the public schools.

Two areas not technically part of the standard learning curriculum, however, have been reasonably challenged by parents of home schooled children: the requirement in a few states that the instructing parent hold a state teaching certificate; and the occasional state or local school district rule that home schooled students take certain standardized tests. One can argue that the teaching certificate requirement for home schooling parents is not a reasonable one and does not advance the purposes of home schooling discussed above,³⁶ while the standardized testing scheme can be viewed as less intrusive and more in line with the purposes of home schooling.

While most states are quite flexible in deeming parents to be qualified as home teachers,³⁷ as of 1990 approximately seven states required instructing

30. *See* *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *People v. Bennett*, 501 N.W.2d 106, 112 (Mich. 1993)(state may reasonably regulate teacher certification and curricular requirements of home education programs).

31. *See, e.g.*, N.J. REV. STAT. § 18A: 38-25 (West 1989).

32. *See In re Blackwelder*, 528 N.Y.S.2d 759 (Sup. Ct. 1988)(petition dismissed alleging parents had educationally neglected their children by not following all state requirements for a "substantially equivalent" education).

33. *E.g.*, *Ellis v. O'Hara*, 612 F.Supp. 379 (E.D. MO. 1985)(requirement that instruction be "substantially equivalent" to that in public schools held to be vague), *rev'd*, 802 F.2d 462 (8th Cir. 1986).

34. *See, e.g.*, *Clonlara, Inc. v. St. Bd. of Educ.*, 501 N.W.2d 88, 91 (Mich. 1993)(only courses required for home schools under Nonpublic School Act were social studies and science classes).

35. 24 PA. CONS. STAT. § 13-1327.1 (e)(1) (West 1992)("[T]he portfolio shall consist of a log made contemporaneously with the instruction which designates by title the reading material used [and] samples of any writings, work sheets, workbooks or creative materials used or developed by the student . . .").

36. *See supra* notes 26-29 and accompanying text.

37. *See, e.g.*, 24 PA. CONS. STAT. § 13-1327.1 (West 1992)(extremely detailed home education scheme but no requirement of teacher certification). *But see* *Lawrence v. So. Car. St. Bd. of*

parents to hold a valid state teaching certificate.³⁸ In general, the credential requirement in these states is thought to advance the state's legitimate interest in compulsory education and in insuring that "all children within its borders are properly educated."³⁹ Although the result can sometimes be different when parents are asserting a Free Exercise claim,⁴⁰ courts generally uphold home education credential requirements against challenges based on substantive due process⁴¹ and other legal theories.⁴²

It is arguable that these decisions are incorrect on policy grounds, however, and that the affected states should modify their home schooling teaching requirements. Home education is frequently thought to be "equivalent" or "substantially equivalent"⁴³ to public school instruction. To require a parent to be a credentialed teacher would move the home education model closer to being identical with the public school model, rather than being merely analogous or similar. In addition, home schooling parents frequently desire not just pedagogical flexibility in their children's education but also normative flexibility, again making the credential requirement somewhat counter-intuitive. Finally, as some states allow persons to be employed temporarily in mainstream public schools who indeed do not even hold state teaching credentials,⁴⁴ it seems illogical to require more preparation on the part of the home parent teacher than the temporary public school instructor.

The requirement that home schooled children from time to time take standardized tests, conversely, appears reasonable and much more in line with the policy rationale for allowing home education. Judicial decisions involving parental challenges to standardized testing of their home-schooled children have been in conflict, however, even concerning a Free Exercise challenge.⁴⁵

Educ., 412 S.E.2d 394 (S.C. 1991)(requirement that parents holding only high school diploma be required to pass basic skills examination was not reasonable).

38. Donald Dorman, *Michigan's Teacher Certification as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J. L. REF. 733, 748 (1990). The seven states are Alabama, California, Iowa, Kansas, Kentucky, Michigan and New Hampshire. *Id.*

39. *People v. Bennett*, 501 N.W.2d 106, 116 (Mich. 1993)(parents have no fundamental right to direct their children's secular education free of reasonable regulation). *But see* *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993)(certification requirement unconstitutional when it infringes parents' Free Exercise rights).

40. *Id.* See generally Donald Dorman, *Michigan's Teacher Certification Requirement as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J. L. REF. 733 (1990).

41. *People v. Bennett*, 501 N.W.2d 106, 111-12 (Mich. 1993).

42. *Clonlara, Inc. v. St. Bd. of Educ.*, 501 N.W.2d 88 (Mich. 1993)(teacher certification requirements were not administrative rules and were valid interpretations of statutory requirements).

43. See *supra* notes 31-35 and accompanying text.

44. See, e.g., CAL. EDUC. CODE § 44301. (emergency permits).

45. See, e.g., *Murphy v. State of Arkansas*, 852 F.2d 1039 (8th Cir. 1988)(use of standardized tests upheld against religiously-based challenge). Cf. *Null v. Bd. of Educ. of County of Jackson*, 815 F. Supp. 937 (S.D. W.Va. 1993)(statute making children ineligible for home school-

The arguably correct view in this area would uphold the use of standardized testing. Appropriate standardized tests should not overly intrude on curricular, normative, and pedagogical flexibility, and will readily comport as well with the state's valid interest in insuring that its citizens be adequately educated. The requirement of standardized testing may also lead state or school officials to be more lenient in other areas of home schooling regulation and oversight, as the testing procedures may provide an evaluative tool or "check" perhaps otherwise lacking in the state regulatory system.

This section has argued that home education is one alternative picture of education, although not always perfectly rendered, which the state offers to parents as part of its comprehensive educational plan. American public education can be flexible. Home education has evolved and will continue to evolve to meet some of the needs of American society, hopefully under the watchful eyes of concerned parents, educators, state legislators, and members of the judiciary.

IV. THE CHARTER SCHOOL MOVEMENT

The charter school movement is another example of an internally generated educational reform mechanism within the American system of public schools. Currently, about thirty states allow some form of charter schooling, but perhaps only one hundred thousand pupils are so enrolled.⁴⁶ Like other reform models such as home schooling⁴⁷ and the movement toward greater public school choice,⁴⁸ charter schools provide an avenue of curricular and institutional flexibility for those parents who desire an alternative form of education for their children but who prefer to remain within the confines of the public school system. In contrast to these other two forms of alternative education, however, charter schools can also offer public school teachers an aspect of career flexibility, as public school teachers are frequently the faculty of a charter school.⁴⁹

ing if standardized test scores fall below fortieth percentile deemed constitutional). *But see In re T.K.*, 475 N.W.2d 88 (Minn. App. Ct. 1991)(trial court should determine if required test is least restrictive alternative available). *Cf. Stobaugh v. Wallace*, 757 F. Supp. 653 (W.D. Penn. 1990) (failure of children to participate in district testing did not justify principal's conclusion that "appropriate education" was not occurring).

46. *Cf. Jay P. Heubert, Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L.L. REV. 301, 353 n. 19 (1997)(in the academic year of 1995-1996, approximately 70,000 public school students were enrolled nationwide in 269 charter schools).

47. *See supra* part III.

48. *See infra* part V.

49. *See* COLO. REV. STAT. § 22-30.5-111 (West 1997).

Because charter schools in the United States are a very new phenomenon, having originated just in 1991,⁵⁰ a description of the various state requirements for charter schools is apt to become quickly outdated. Notwithstanding this, it is possible to set forth the typical state rules governing the formation of charter schools and their educational missions, as well as describing some of the already existing legal challenges to this new reform movement.

Charter schools are public educational institutions which are granted special permission to operate within a state in order to pursue a unique educational mission.⁵¹ These schools are called "charter schools" because they exist only pursuant to a separate agreement, contract, or charter with the state. Because the purposes of charter schools are to promote flexibility and diversity in pedagogy, curriculum, and educational mission, state legislatures frequently exempt charter schools from many of the state-imposed laws and rules governing public education, including those relating to collective bargaining and teacher work hours.⁵²

The so-called "charter" governs the formation of these public, alternative schools. Although varied and flexible in format and function, many state charter schemes view the charter as a binding, performance-based contract, where the school promises to achieve certain student performance objectives in return for state funding⁵³ and freedom from much of the legal supervision of the state and local educational apparatus. A conception of the governing charter that would be more in line with the general purposes of charter schools, however, would not be too rigidly performance-based, especially in the earlier years of a school's existence.⁵⁴

50. Minnesota established the first public school charter laws in 1991. Sarah Lubman, *Breaking Away - Parents and Teachers Battle Public Schools by Starting Their Own*, WALL ST. J., May 19, 1994, at A1. In 1994, there were only 41 charter schools nationwide, enrolling a mere 12,700 pupils. *Id.* Interestingly enough, the state of Minnesota was also the first state in the nation to establish a system of state-wide public school choice. See *infra* notes 75-82 and accompanying text.

51. See, e.g., MASS. GEN. L. ch. 71, § 89 (d)(1) (West 1997) ("The purposes for establishing charter schools are (1) to stimulate the development of innovative programs within public education . . . "); N.M. STAT. ANN. § 22-8A-2(A) (Michie 1993) ("[C]harter school" means an individual school within a school district, authorized by the state board to develop and implement an alternative educational curriculum and authorized by law to develop and utilize a school-based budget . . . ").

52. See, e.g., TEX. EDUC. CODE ANN. § 12.103 (West 1997) (Texas charter schools generally exempt from state education laws and regulations except as specifically provided; Julie Forster, *Florida: Legislature Approves 'Charter' Schools, Raises Graduation Standards*, 5-9-96 WLN 4079, 1996 WL 265022 (Florida charter schools not required to follow most laws and rules governing Florida public schools)).

53. See generally e.g., GA. CODE ANN. § 20-2-255 (a)-(i) (1993).

54. See, e.g., WIS. STAT. ANN. § 118.40 (5)(b) (West 1998) (charter may be revoked if students fail "to make sufficient progress toward attaining the educational goals . . . ").

The charters for this model of alternative public schools are typically reviewed and granted by the Board of Education at the state level,⁵⁵ although many states prefer to have local school authorities be the chartering bodies.⁵⁶ A better model which would take into account both the interests of the state and of local schools, parents, and teachers would appear to one which melded aspects of both a state and local approval approach. The chartering format in Michigan, for instance, approaches this compromise model in that it allows four different entities to be issuers of school charters for "public school academies": the board of a local school district, an intermediate school board, a community college school board, and the board of trustees of a state university.⁵⁷ The American public would probably be quite interested in the fact that the charter school movement has so many educational variants within its ambit.

It should be recalled, however, that the charter school approach is a small, "boutique"-type form of educational service. By statute, most states dramatically limit the number of charters which may be granted. The state of Wisconsin, for example, originally set its charter school complement at twenty,⁵⁸ while Massachusetts allowed only twenty-five schools⁵⁹ and Kansas, twenty charter schools.⁶⁰ One reason that some states curtail the number of charter schools which may be founded is that in some areas of the country, charter schools are simply traditional public schools which have been converted to charter status.⁶¹ In these states, no additional schools are being added to the educational supply and thus little additional state funding is needed. The alternative model, however, in which at least some charter schools are *additional* public schools⁶² probably also deserves numerical caps. This is so not solely to protect the state's coffers, but also to not overly burden the public schools with *undue* competition in a short time period. This same reasoning also explains why the initial duration of each charter granted is limited, typically to a term of five years.⁶³ It would be unfair to students and taxpayers within the

55. See, e.g., GA. CODE ANN. § 20-2-255 (1993); MASS. GEN. L. CH. 71 § 89 (West 1997); See generally N.M. Stat. Ann § 22-8A-1 (Michie 1993); TEX. EDUC. CODE ANN. § 12.101 (West 1997).

56. See, e.g., CAL. EDUC. CODE § 47605 (West 1993); COLO. REV STAT. § 22-30.5-106 (West 1997).

57. MICH. COMP. LAWS ANN. § 380.501(2) (West 1997).

58. WIS. STAT. ANN. § 118.40 (West 1998)

59. See generally MASS. GEN. L. CH. 71 § 89 (West 1993).

60. S.B. 803 (3), 75th Leg., 1994 Kan. Laws.

61. See Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996)(no violation of equal protection found in the method Colorado uses to establish public charter schools).

62. See generally Mass. Gen. L. ch. 71 § 89 (West 1997); MICH. COMP. LAWS ANN. § 380.501 (West 1997).

63. See, e.g., TEX. EDUC. CODE ANN. § 12.111 (1) (West 1997).

public schools, as well as to the same parties within charter schools, to grant permanent legal status to what is in essence a "start-up" business.

Again revealing the flexibility and diversity of the charter school movement, the required provisions of the charter contract vary substantially. Typically included are a description of the education program to be offered,⁶⁴ a financial plan,⁶⁵ and the method through which the progress of students towards the objectives of the program are to be measured.⁶⁶ Some states require that the charter itself contain a statement that the school will not discriminate,⁶⁷ but the better approach would be to set forth such requirements only in the state enabling statute. Placing such anti-discrimination provisions in the charter itself, which is a legal contract, might tempt a school to use a contract defense of "substantial compliance" if threatened with a legal action asserting racial or other discrimination.⁶⁸

Thus far in this discussion, the charter school movement has perhaps appeared to be an ideal model for incubating educational change within American public schools. The charter school model does have several potential and serious legal and policy drawbacks. One troubling issue might be the tendency in many states to exempt public school teachers who choose to teach in charter schools from state collective bargaining rules and other laws.⁶⁹ Although this "freedom" is said by many to be at the core of the charter school movement's appeal, charter school teachers are even more likely than traditional public school teachers to be beset by the burn-out caused by working long hours, in poor facilities, at relatively low pay. This is so because states typically do not provide funds for facilities acquisitions or other "start-up" costs of charter schools, almost guaranteeing teacher salaries below those offered in the public schools and working facilities less adequate than the marginal buildings in which many traditional public schools currently operate. Parenthetically, it might be added that at least two states, Arizona and California, do not even require charter school teachers to hold a state teaching credential.

Such legal flexibility and lack of rigid state oversight can also have other negative impacts on charter schools. At least one charter school has had its

64. See, e.g., MASS. GEN. L. CH. 71 § 89 (f) (West 1997).

65. See, e.g., CAL. EDUC. CODE § 47605 (b)(3) (West 1993).

66. See, e.g., WIS. STAT. ANN. § 118.40 (1m)(b)(5) (West 1998).

67. MASS. GEN. L. CH. 71 § 89 (f)(9) (West 1997) TEX. EDUC. CODE ANN. § 12.111(6) (West 1997).

68. Cf. generally Victoria J. Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 KAN. L. REV. 701 (1985).

69. See, e.g., COLO. REV. STAT. § 22-30.5-104 (West 1997). Cf. *Devlin v. School Committee of Chelsea*, 1994 WL 879537 (Mass. Super. 1994) (state enabling act validly exempted teachers from some collective bargaining rules where private university oversaw public high school).

charter revoked because of financial irregularities.⁷⁰ In addition, because in many states charter schools are crafted from existing public schools, there have already been legal challenges to charter school formations as a species of discriminatory, educational gerrymandering.⁷¹ Finally, there is a growing legal controversy concerning the applicability of federal disability laws to charter schools.⁷²

With some faults, charter schools are an extremely interesting educational experiment in American public schooling. Although woefully under supported financially by state and local governments,⁷³ charter schools are a fascinating and complex response to a changing educational landscape. Hopefully, American courts will, over time, appropriately adjudicate the inevitable legal disputes which arise when a new enterprise form is invented. American public education does evolve.⁷⁴

V. THE MOVEMENT TOWARD PUBLIC SCHOOL CHOICE

The public school choice movement is another modern example of an alternative education model being offered in American public schools. Public school choice is the concept that students within public schools need not attend solely their assigned schools, but may also choose to attend other schools within their own school district or within the larger state.⁷⁵ A growing majority of states has authorized some sort of public school choice plan. Public school choice plans are different from so-called "voucher proposals,"⁷⁶ where students would be able to take their state dollars and place them toward attendance at public or private schools, including religiously-based schools.⁷⁷ The

70. Sarah Lubman, *Charter is Revoked for Local School of Los Angeles*, WALL ST. J., Dec. 7, 1994, at B6.

71. See, e.g., *Villanueva v. Carere*, 85 F. 3d 481 (10th Cir. 1996).

72. See generally Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradox of Deregulations*, 32 HARV. C.R. - C.L.L. REV. 301 (1997).

73. Sarah Lubman, *Breaking Away - Parents and Teachers Battle Public Schools by Starting Their Own*, WALL ST. J., May 19, 1994, at A1.

74. But see *Id.* (President of Minnesota Education Association declares charter schools are "on the fringe" and are "dead-end" experiments").

75. See Elaine M. McGillivray, *The New Minnesota Miracle?: A Critique of Open Enrollment in Minnesota's Public Schools*, 11 HAMLINE J. PUB. L. & POL'Y (1990).

76. The first proponent of school choice programs or vouchers was economist Milton Friedman, in his 1962 book, *CAPITALISM AND FREEDOM*.

77. See, e.g., Frank R. Kemerer, *the Constitutionality of School Vouchers*, 101 EDUC. L. REP. 17 (West 1995). A program in Milwaukee, Wisconsin, is one of the few public choice programs ever to exist which actually allowed low-income students to use state dollars to pay tuition at private, religiously-based schools. The program has been challenged in several cases, the most recent one being *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 67 USLW 3170 (program did not violate "religious benefit" clause of state constitution). Cf. WIS. STAT § 119.23 (West 1997) (Milwaukee parental choice program).

general availability of public school choice plans ostensibly gives parents many school options, again indicating the flexibility of American public education.

The first state to adopt statewide public school choice, also known as "open enrollment," was Minnesota in 1990.⁷⁸ Variants of public school choice programs have proliferated and have now been established in most states. Statutory schemes encompassing state-wide public school choice can be discussed according to three or four different variables; American public school choice plans are not monolithic.

Most states with state-wide student selection of public schools require local school districts to specify criteria for the acceptance or rejection of students, assuming classroom space is available. Among a number of states, Minnesota statutes provide that students may not be refused or granted admission into another public school district because of reasons relating to academic achievement, English language proficiency, or participation in athletic or other extracurricular activities.⁷⁹ These are sensible rules and also should be made applicable, where appropriate, to a state's charter schools.⁸⁰ When creating new public school alternatives, such as choice programs, state legislators have appeared to attempt to draft fair rules, another indicator of a responsive educational system.

Another variable in some public school choice plans is a requirement that parents be extensively informed about the educational options in each district of the state.⁸¹ In essence a consumer law, the requirement of full disclosure and information for registering parents will also increase public educators' knowledge of schooling within the state, a concern in general of critics of public education.⁸²

A flaw present in most state-wide public school choice systems, and well as charter systems, however, is that very few states provide school bus transportation to low-income students who desire to attend schools at a distance from their homes.⁸³ The identical criticism can be made of hypothetical, full-scale voucher programs. It cannot be emphasized enough that the lack of state-provided transportation is perhaps the most important variable blocking the full flowering of both the public school choice movement and the charter school movement. And it is indeed this factor that explains one of the major fallacies of classic voucher programs: If students are physically unable to at-

78. MINN. STAT. § 120.62 (1994).

79. MINN. STAT. § 120.062(7) (1993). *See also* N.D. CENT. CODE § 15-40.3-06 (1997).

80. *See generally supra* part IV.

81. *See, e.g.,* MASS. GEN. L. CH. 76, § 12(b)(h) (West 1996). *Cf.* MICH. COMP. LAWS § 388.1623a(8)(a)(i) (1997)(in-district choice plan).

82. *Cf. supra* text accompanying notes 1-4.

83. *But see* MASS. GEN. L. CH. 76, § 12 (b)(i) (West 1996).

tend any but one or two schools, then no competitive economic market in education exists, because demand can never change, and a voucher program becomes merely a state subsidy for those parents wealthy enough to transport their children to a private school.

For these and other reasons,⁸⁴ the better public school choice model may be "district-wide" choice. Under these state schemes, public school students may attend any public school within their home school districts, assuming space availability.⁸⁵ This model of public choice is sometimes referred to as "in-district" choice. Generally organized under similar admissions and other rules as state-wide school choice plans,⁸⁶ more localized public school choice plans may ultimately be more effective.

Public school choice plans are another arrow in the expanding American public education quiver. Parental desires for increased options within the traditional public school system are being increasingly met. Except for transportation concerns, in a number of states children can attend virtually any public school within their home state. It is difficult to envision a more flexible system of public education.⁸⁷

VI. CONCLUSION

American public education does evolve and change. Currently, at least four alternative models of education exist under the general umbrella of state public education: traditional public schooling, home schooling, the charter school movement, and public school choice, both state-wide and intra-district. Among these various models are ample opportunities for parents to select a public school that is well matched with the educational and psycho-social needs of their child. Contrary to the myth perpetrated in some popular and legal quarters, pedagogical and curricular flexibility and diversity is alive and

84. Financial reasons also cloud the prospects of state-wide public school choice. Even if a state has somewhat equalized public school funding, inter-district per-pupil expenditures still vary significantly. These disparities may punish transferring school districts if they are forced to pay the per-pupil costs of wealthier receiving districts. Until corrected by legislative action, for example, a few low-income school districts in Massachusetts lost several hundred thousand dollars when their students transferred to wealthier districts pursuant to an optional, state-wide public school choice program. THE CARNEGIE FOUNDATION, SCHOOL CHOICE 57 (1992). At least one state has obviated this problem, however, by having the sending district pay the lower of the two district's costs. IOWA CODE § 282.18(8)(1997).

85. See, e.g., ALA. CODE § 16-3-20.1 (1997) (system allows public school choice within a specific county or city school system).

86. See *supra* notes 78-83 and accompanying text.

87. Research on the effectiveness of public school choice plans is still somewhat primordial but is very intriguing. See PARENTS, THEIR CHILDREN, AND SCHOOLS 170-172 (Barbara Schneider and James S. Coleman eds., 1993)(after statistical study, authors conclude that African-Americans and Hispanics primarily respond to increased choice options in public, not private, school sector).

well in American public education. Horace Mann and John Dewey might very well be quite proud.